

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRENT MATTHEW GENDRON,

Defendant-Appellant.

UNPUBLISHED

March 1, 2005

No. 251509

Wayne Circuit Court

LC No. 03-004733-01

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of second-degree murder, MCL 750.317, and carrying or possessing a firearm in the commission or attempted commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 14 to 25 years for the murder conviction and to 2 years, to be served consecutively to the murder sentence, for the felony-firearm conviction. We affirm.

I. Sufficiency of the Evidence

We shall first address defendant's claim that there was insufficient evidence to convict him of second-degree murder. We review de novo a challenge to the sufficiency of the evidence in a bench trial. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). When reviewing an insufficiency of the evidence claim in a criminal case, "this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime were proved beyond a reasonable doubt." *People v Moorer*, 262 Mich App 64, 76-77; 683 NW2d 736 (2004), citing *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). The standard is deferential and requires that this Court "draw all reasonable inferences and make credibility choices in support of the jury verdict." *Nowack, supra* at 400. Defendant does not contend that there was insufficient evidence of the elements of second-degree murder or felony-firearm, but rather argues that there was insufficient evidence to establish his identity as the person who shot the victim. Identity is always an essential element of a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). We disagree that there was insufficient evidence identifying defendant as the person who shot the victim.

At trial, the bartender of the bar, outside of which the shooting took place, testified that he observed defendant arguing with a person in a car through the bar's open door. The bartender

further testified that, after the car drove off, the victim reentered the bar, at which point the bartender asked the victim about the identity of the person with whom he had been arguing. The bartender testified that the victim responded, “It was Trent, the guy that hit Anti with the Q-ball in his mouth.”¹ The bartender also testified that, after this, the victim said, “Trent keeps coming around.” The bartender then stated that the same car returned and the victim again began to argue with the driver. He further stated that, during that argument, the driver pulled out a gun and shot the victim in the face.

Another witness testified that she lived near the bar and that she knew defendant and saw him driving his car near the bar on four separate occasions on the day of the murder. She testified that after the third time she observed defendant driving his car near the bar, she heard ambulances. Finally, a third witness testified that he was standing on a street corner near the bar and saw a car drive past the bar, make a u-turn, and stop in front of the bar’s door with the passenger side facing the bar. The third witness testified that he heard an argument and then heard a gunshot from in the car. This witness positively identified defendant as the driver of the car that stopped in front of the bar.

Drawing all reasonable inferences from the evidence and making all credibility choices in support of the verdict, we find that there was ample evidence provided to support the trial court’s finding that defendant was the person who drove up to the front of the bar, engaged in a verbal argument with the victim, and then shot and killed him. Defendant’s contention that this identification evidence was weak and did not warrant a conviction in light of his strong alibi defense does not alter our conclusion. A trial judge, as trier of fact, has the duty to weigh the testimony and assess the credibility of the witnesses, *People v Snell*, 118 Mich App 750, 755; 325 NW2d 563 (1982), and an appellate court must defer to the trial court’s resolution of factual issues, especially where it involves the credibility of a witness. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997). The trial court clearly did not believe defendant’s alibi witnesses and we decline defendant’s invitation to reevaluate the trial court’s credibility assessment.

Defendant also contends in the alternative, that, because the shooting was immediately preceded by an argument, his second-degree murder conviction should be reduced to manslaughter. Defendant fails to explain by citation to the record or to relevant authority, why this should be the case. Therefore, defendant has abandoned this issue on appeal. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (“An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment of an issue with little or no citation of supporting authority.”). Even if the issue had not been abandoned, based on the evidence presented at trial, we would not find the mitigating circumstances necessary to justify manslaughter. The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes

¹ The victim’s sister testified that this was a reference to an incident that occurred approximately one year earlier, where defendant hit her boyfriend, whose nickname was Anti, in the face with a pool ball. The victim’s sister further testified that, although her brother did not witness the incident, she told her brother about it.

the defendant to act out of passion rather than reason. *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). Furthermore, the provocation must be of a type that would cause a reasonable person to lose control. *Id.* The only provocation for which there is evidence in this case, involved a verbal argument, and words are generally insufficient to constitute adequate provocation. *Id.* at 391. Therefore, there is no basis for a reduction in defendant's sentence from murder to manslaughter.

II. Hearsay

Defendant next claims that the trial court committed error warranting reversal when it permitted the admission of the victim's statements to the bartender identifying defendant as the person with whom he was arguing. Again, we disagree.

At trial, the bartender testified that the victim identified defendant as the person with whom he had been arguing just moments before. Defendant objected to this testimony, but the trial court permitted its admission under the present sense impression exception to the hearsay rule. A trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). However, whether a rule or statute precludes admission of evidence is a matter of law and reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Hearsay is not admissible evidence, unless permitted by an exception. MRE 802. An exception to the general prohibition against hearsay is for a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. MRE 803(1).

To be admissible as a present sense impression, three conditions must be met: (1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be substantially contemporaneous with the event. *People v Hendrickson*, 459 Mich 229, 236; 586 NW2d 906 (1998). In addition, there must be corroboration that assures the reliability of the statement. *Id.* at 237. To meet the corroboration requirement, there must be independent proof, direct or circumstantial, that the underlying event took place. *Id.* at 238. In the present case, all these requirements were met.

The bartender's testimony that he observed the victim engaging in the argument with the man in the car through the bar's open door, satisfies the requirement that there be evidence that the declarant personally observed the event and establishes the corroborating evidence that the event occurred. Likewise, the bartender testified that when the argument concluded and the victim reentered the bar, the bartender asked the victim to identify the person with whom he had been arguing and the victim responded by identifying defendant. Clearly this is a description of the event. Finally, although there was no direct testimony regarding the time that elapsed between the conclusion of the argument and the victim's statement to the bartender, our Supreme Court has concluded that a four-minute interval between the perceived event and the declarant's statement satisfied the 'immediately thereafter' condition. *Id.* at 236. Given the testimony at trial, one could conclude that the victim reentered the bar shortly after the argument. Hence, we cannot conclude that the trial court abused its discretion in admitting the victim's statement, because each element necessary to admit a hearsay statement as a present sense impression was met. Therefore, there was no error warranting reversal.

III. Prior Acts Evidence

Defendant next asserts that the trial court committed error warranting reversal when it admitted testimony by the victim's sister that defendant had struck her boyfriend with a pool ball at some point in the past. Defendant contends that this testimony was improperly admitted for an impermissible purpose and, even if it were not, the prejudicial nature of the evidence substantially outweighed its probative value. Finally, defendant asserts that the prosecutor submitted the prior acts evidence without the notice required under MRE 404(b)(2), and, therefore, this Court must reverse. We disagree with each contention.

As a preliminary matter, we note that defendant's trial counsel objected to the admission of the other acts testimony on grounds of relevancy. An objection on one ground is insufficient to preserve a claim of error on another ground. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Hence, this issue was not properly preserved on the grounds of improperly admitted prior acts evidence, and, therefore, this Court will review it for error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Our Supreme Court has stated that, for other acts evidence to be admissible under MRE 404(b), (1) the evidence must be offered for some purpose other than a character to conduct theory, (2) the evidence must be relevant, and (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). In this case, the bartender testified that, the victim stated that the man in the car with whom he had just had an argument was "Trent, the guy that hit Anti with the Q-ball in his mouth." To clarify the identity of the person to whom the victim referred, and corroborate the victim's statement, the prosecutor called the victim's sister to testify concerning an earlier incident where defendant struck her boyfriend with a pool ball.

In his brief on appeal, defendant erroneously argues that the act of striking someone in the face with a pool ball is insufficiently similar to the charged offense to meet the identity exception to MRE 404(b)(1). Defendant erroneously assumes that all prior acts evidence tending to show identity must comply with the rules for modus operandi identifications. This is simply not accurate. See *People v Fuqua*, 146 Mich App 250, 257; 379 NW2d 442 (1985) (stating that victim's testimony regarding an earlier crime committed by defendant is permissible because it was relevant to show that the victim was subsequently able to identify the defendant), overruled on other grounds by *People v Gray*, 466 Mich 44; 642 NW2d 660 (2002); *People v Pointer*, 133 Mich App 313, 315; 349 NW2d 174 (1984) (permitting testimony concerning defendant's arrest for a different crime for the limited purpose of establishing his identity as the perpetrator of the charged crime). See also 22 Wright and Graham, Federal Practice and Procedure: Evidence (1978), § 5246, p512 ("This exception, often referred to as the 'handiwork or signature exception' or the exception for 'modus operandi' is, however, only one method by which other crimes can prove identity. It is important that courts recognize these different modes so as not to impose requirements, such as distinctive similarity, that apply only to the modus operandi method of identification, or different methods of using other crimes evidence to show identity."). Therefore, the prior acts testimony was admitted for proper purposes (i.e., identification of the perpetrator and demonstrating how the victim was able to accurately identify defendant), rather than being offered "solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993).

In addition, the evidence was relevant. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. The prior acts testimony clarified that the defendant was the Trent who struck Anti with a pool ball in the mouth and, therefore, helped establish that the victim had referred to defendant rather than some other Trent. Likewise, the prior acts testimony corroborated the victim's present sense impression. Finally, the prejudicial value of the prior acts testimony did not outweigh, let alone substantially outweigh, the probative value of the evidence. The identification and corroborative value of the evidence substantially bolstered the victim's identification of defendant and it is highly unlikely that anyone, let alone a judge sitting as the trier of fact, see *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988) (noting that judges are presumed to know the law and decide the case based solely on the evidence properly admitted), would convict defendant of murder because he hit someone in the mouth approximately a year earlier with a pool ball. Therefore, the trial court did not commit error, let alone plain error affecting defendant's substantial rights, by admitting this testimony.

Finally, defendant correctly notes that MRE 404(b)(2) requires the prosecutor to give reasonable notice in advance of trial of the general nature of any prior acts evidence it intends to introduce at trial. In the present case, the prosecutor failed to give proper notice, and, therefore, there was plain error. Defendant contends that this error, under the precedent established in *People v Ullah*, 216 Mich App 669; 550 NW2d 568 (1996), mandates reversal. Defendant's reliance on *Ullah* is misplaced. The court in *Ullah* held that reversal was mandated by the admission of improper prior acts testimony where, "(1) the prosecutor did not move to admit this evidence in accordance with MRE 404(b)(2), (2) the prosecutor cited an improper purpose for admitting the bad-acts evidence, (3) such evidence was not logically relevant to an element of the charged offenses, (4) the trial court found the evidence more prejudicial than probative, and (5) the jury may have given undue weight to this prejudicial testimony." *Id.* at 676. In this case, although the prosecutor did not give proper notice, we have determined that the evidence was offered for a permissible purpose, was relevant, was not more prejudicial than probative, and there was no possibility that the trier of fact would give undue weight to the prejudicial nature of the testimony. Furthermore, this Court has stated that, while lack of notice may be adequate to warrant reversal in some cases, where the lack of notice did not have a significant effect, either alone or in concert with other factors, it will not warrant the grant of a new trial. *People v Hawkins*, 245 Mich App 439, 456; 628 NW2d 105 (2001). As was the case in *Hawkins*, defendant has not suggested how notice would have prevented this admissible testimony from being admitted, see *id.* at 455, and, consequently, has not and cannot show that the lack of notice harmed him. Because defendant has not demonstrated that this error was outcome determinative, there is no error warranting reversal.

IV. Sentencing Issues

Defendant next argues that the trial court erred in the scoring of offense variables 5 and 6. Because defendant committed the offense after January 1, 1999, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). We review a trial court's scoring decision to determine whether the court properly exercised its discretion and whether the evidence adequately supports the score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there

is any evidence in support will be upheld.” *Id.* When the trial court’s sentence is within the appropriate guidelines range, “the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant’s sentence.” *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

We shall first address defendant’s argument that OV 6 was improperly scored at 25 points. Defendant argues that, because the murder was precipitated by an argument, OV 6 should have been scored at 10. We disagree.

Offense variable 6 deals with the offender’s intent to kill or injure another individual. MCL 777.36(1). The trial court scored OV 6 at 25, which applies when the offender “had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result.” MCL 777.36(1)(b). However, if the offender had “intent to injure or the killing was committed in an extreme emotional state caused by an adequate provocation and before a reasonable amount of time elapsed for the offender to calm,” then OV 6 should be scored at 10. MCL 777.36(1)(c). As we already noted, there was no evidence presented at trial that indicated that defendant acted under an extreme emotional state caused by an adequate provocation. Defendant engaged the victim in a verbal argument, while defendant sat safely in his automobile. Therefore, we cannot say that, based upon the evidence presented at trial, the trial court improperly exercised its discretion. Therefore, we find no error in the scoring of 25 rather than 10 points for OV 6.

Finally, we decline to address whether OV 5 was properly scored at 15 points. Defendant’s total OV score was 70,² placing him at the A-II level, and even if we were to find that OV 5 should have been scored zero, defendant would still have 55 offense variable points and, therefore, still be within the A-II level. See MCL 777.61. When the correct score “would not change the guidelines recommended range, remand for sentencing is not required.” *People v Houston*, 261 Mich App 463, 473; 683 NW2d 192 (2004). Defendant’s sentence was properly within the recommended minimum range of 144 to 240 months for level A-II.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski

² We note that the sentencing information report attached to defendant’s brief does not reflect the total OV actually scored by the trial court. The trial court changed OV 3 from 25 to 0 and changed OV 5 from 0 to 15. This left defendant with a total OV score of 70 rather than 80.